

**STATE OF MICHIGAN**

**BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION**

**COMPLAINT AGAINST:**

**Referee David G. Myers**

Sanilac County Friend of the Court  
60 W Sanilac Road  
PO Box 187  
Sandusky, MI 48471

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**Docket No.**

**Formal Complaint No. 86**

**REPLY TO AFFIRMATIVE DEFENSES**

In reply to Respondent's affirmative defenses submitted in response to the formal complaint, Paul J. Fischer, Examiner, on behalf of the Judicial Tenure Commission, asserts:

1. Respondent has not been denied equal protection of the law, based on the following:
  - a. Respondent is not "similarly situated" to an attorney, as:
    - i. Respondent admits he is a referee, and pursuant to MCR 9.201(B)(2) and MCR 9.205(B)(2), he is subject to all provisions of both MCR 9.200 *et seq.*, and the Code of Judicial Conduct.
    - ii. Respondent admits that the Michigan Code of Judicial Conduct is applicable to him.

iii. Respondent admits that he has violated provisions of the Code of Judicial Conduct.

iv. Neither the Michigan Court Rules nor the Code of Judicial Conduct provides for dissimilar treatment of conduct committed by a referee (who is appointed), compared to that committed by a judge (who is elected).

v. Respondent's position as a referee, regardless of the fact that he is appointed and not elected, constitutes a judicial office that both inherently and under the Code of Judicial Conduct has a higher standard of conduct than that attributed to an attorney merely engaged in the practice of law.

vi. The Michigan Code of Judicial Conduct provides (and litigants expect) that a referee should avoid irresponsible and improper conduct, respect and observe the law, and engage in conduct and manner that promotes public confidence in the judiciary.

b. The Michigan Supreme Court has regularly exercised jurisdiction over, and imposed discipline on, non-elected judicial officials through the judicial disciplinary process. The most recent is Magistrate James P. Conrad of the 37<sup>th</sup> District Court (Conrad received a 90-day suspension from his duties as a magistrate, an appointed position, based on

his driving a motor vehicle while intoxicated). *In re Conrad*, 472 Mich 1242 (2005)

c. There is no obligation for the Commission to offer Respondent an opportunity to avoid “formal prosecution” through any type of probation or conditions, in either MCR 9.100 *et seq.*, or MCR 9.200 *et seq.*, based on his being an attorney or for any other reason. There is no provision in the court rules that authorizes the Commission to do so.

2. The filing of the complaint on June 14, 2010, did not violate the legal doctrines of laches or estoppel, based on the following:

a. Although the traffic stop occurred on September 23, 2009, Respondent did not self-report the incident to the Commission until February 1, 2010, so that over four months of any alleged “delay” is attributable to him.

b. The following is a chronology of events relating to the Commission’s investigation of this matter:

<u>Date</u>	<u>Event</u>
February 1, 2010	Respondent self-reported to Commission
February 18, 2010	File opened and investigation authorized
March 9, 2010	Investigation completed and comment requested
March 26, 2010	Respondent provided comment
May 3, 2010	Commission issued 28-day letter
May 21, 2010	Respondent replied to 28-day letter
June 15, 2010	Commission filed formal complaint

c. MCR 9.200 *et seq.* allows the Commission to obtain a judge's comment, and mandates that the Commission issue a letter proving Respondent with notice of the allegations against him, with a 28-day period to reply to them, prior to filing a formal complaint, which was promptly undertaken and completed.

d. In addition to obtaining a comment and response to the 28-day letter, the staff had to obtain and review the police and court files, and prepare and submit reports to the Commission for its consideration of the investigation results. The Commission staff has acted promptly in this matter by filing the formal complaint within four and a half months from notice of the offense, which is, in the context of bringing a disciplinary action, a relatively short period.

e. Respondent has not asserted that he is disadvantaged in any way as to his ability to defend the allegations made against him due to the period that has passed since the he engaged in the conduct at issue, he has responded to and admitted all factual allegations in the complaint, and there is no claim of prejudice due to the unavailability of witnesses, or poor recollection of witnesses, due to the passage of time.

f. Respondent's affirmative defenses based on laches and estoppel seemingly focus on the impact of a suspension on his duties as a referee and the court's ability to provide coverage for them, which is irrelevant to those defenses. Respondent ignores the fact that the State Court Administrative Office will assist the Sanilac County Circuit Court in retaining an interim referee to perform Respondent's duties if he is suspended.

g. Respondent's payment of criminal fines and participation in probation are irrelevant to the judicial disciplinary process, as they do not relate to his status as a judicial officer, offset the impact his improper conduct has had on the dignity of the judicial office, or serve as a deterrent against others violating the Code of Judicial Conduct.

3. Respondent has failed to “satisfy” his obligations under the Code of Judicial Conduct, as:

a. The dismissal of the Attorney Grievance Commission investigation against him was based on a referral to the Judicial Tenure Commission for investigation and prosecution, for jurisdictional reasons due to Respondent’s position as a referee.

b. Respondent’s alleged compliance with his terms of probation in the criminal proceeding is not relevant to judicial disciplinary matters, as the criminal process is independent from Commission proceedings. The criminal penalties do not relate to his status as a referee, offset the impact his improper conduct has had on the dignity of the judicial office, or serve as a deterrent against violating the Code of Judicial Conduct.

